

March 29, 2019

Dear Superintendent Hoffman:

I am the CEO of ASU Preparatory Academy. I write in response to John Carruth's March 22, 2019 letter stating that ASU Prep is not eligible for small school weight funding. I appreciate the invitation to explain why we disagree with that decision. As explained below, our disagreement is based on your own department's prior legal analysis and an explicit decision, in 2015, that ASU Prep was entitled to receive small school weight funding.

We think ADE's prior decision was the right decision and should be reaffirmed. But if ADE insists on this new position even though it is wrong and even though it is flatly contrary to the 2015 determination, ADE is equitably estopped from implementing it. ADE cannot now change course because ASU Prep was reasonably entitled to and did rely on the 2015 determination.

ASU Prep's students, teachers and staff will suffer significant damage if it has to repay \$5.3 million and also loses small school weight funding for the remainder of this fiscal year and the next. As explained below, fundamental fairness and decades of established legal precedent require that the impact of your decision be prospective only and that implementation be delayed until fiscal year 2021. And even at that point, if ASU Prep cannot continue to receive the small school weight funding, reductions must be phased in over the same three-year period that the statute you rely on provided for the schools that were impacted by the 2015 legislative change that is the basis for ADE's new position.

ADE's 2015 Position That ASU Prep Was Entitled to Small School Weight Funding.

While Mr. Carruth's letter does not specifically reference the 2015 legislation, he does cite an Attorney General opinion interpreting that legislation. Four years ago, however, ADE's financial and legal staff reviewed that same legislation, with the benefit of that same AG opinion, and reached the exact opposite conclusion. Mr. Carruth's letter makes no mention of the prior determination, so I assume it was inadvertently overlooked.

For your convenience, here is a screenshot of an email dated July 20, 2015. The e-mail explicitly references the new legislation and a legal analysis conducted after the issuance of the AG Opinion that was addressed to your predecessor and that ADE now cites as the basis for its new position.

From: Friesen, Lyle [<mailto:Lyle.Friesen@azed.gov>]
Sent: Monday, July 20, 2015 8:51 AM
To: Marcie Rodriguez <Marcie.Rodriguez@asu.edu>
Cc: Jay Kaprosy <jkaprosy@veridus.com>; eileen@azcharters.org; Berg, Ashley <Ashley.Berg@azed.gov>
Subject: University Sponsored Charters, Small School Weight

Marcie,

After reviewing the information that you and Jay Kaprosy provided the Department regarding the Small School Weight cuts to ASU Prep, Superintendent Douglas and Chief of Staff, Michael Bradley along with staff in School Finance and Legal have determined that ASU Preparatory will receive the full Small School Weight as calculated under ARS 15-943. The provisions outlined in SB 1476 do not pertain to ASU Prep as it is not a charter holder as defined under ARS 15-101. Based on the estimated counts you submitted, ASU Prep will receive a SSW in FY 2016 of about \$1.2 million.

Thank you for continuing to engage in conversation with the Department on this issue as it is evident that the language is a bit unclear.

Please let me know if you have any additional questions or if School Finance can be of any further assistance.

Lyle

Lyle Friesen
Deputy Association Superintendent, School Finance
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This conclusion is consistent with an even earlier determination that ADE made following the passage of the 2015 legislation. That determination followed a series of discussions with the charter school community in which ADE's Chief of Staff, its School Finance team and its legal counsel from the Arizona Attorney General's Office participated. Based on those discussions, ADE and the Arizona State Board of Charter Schools jointly sent a May 15, 2015 letter stating that schools not sponsored by the Arizona State Board for Charter Schools, e.g., university sponsored schools, "appear to be exempt from the reduction and subsequent elimination of the Small School Weight." A copy of that letter is available at <http://www.azed.gov/finance/files/2015/05/charter-small-school-weight-fy16-may-15-2015.pdf>.

The AG opinion came after that letter was sent, but, as shown above, after further analysis, which had to have included consideration of the AG opinion, ADE confirmed its position as to ASU Prep.

It was the right decision then and it is the right decision now.

ADE is Equitably Estopped from Changing Its Mind.

We believe ADE's twice-stated position in 2015 was correct. But even if ADE is justified in reversing its interpretation, it is fundamentally unfair to require the repayment of all of the small school weight monies, over \$5 million, that ASU Prep has used to provide a quality education to students across our state and to support the teachers and staff who make that possible. It is also legally impermissible.

As we will further make clear if we are required to appeal this retroactive application of the statute, at a minimum, ADE is equitably estopped from taking such punitive action. As per established caselaw, equitable estoppel applies against the State and its agencies when (1) the State commits affirmative acts inconsistent with a position it later adopts; (2) the other party relies on the State's affirmative acts; and (3) the relying party is injured as a result of the State's repudiation of its prior conduct. Valencia Energy Co. v. Ariz. Dep't of Revenue, 191 Ariz. 565, 576-77 ¶ 35 (1998); Open Primary Elections Now v. Bayless, 193 Ariz. 43, 47 ¶¶ 14-15 (1998).

All of the requirements for equitable estoppel are met here.

ADE has taken affirmative steps that are inconsistent with its current position. One need only look at the 2015 e-mail and last week's letter to conclude that ADE's new decision is flatly contrary to what it said four years ago. ADE could not have been clearer when it said, "ASU Preparatory will receive the full Small School Weight as calculated under ARS 15-943."

ADE made that statement after the 2015 legislative amendment and after the Attorney General's Opinion was released. ADE then acted on its decision by giving ASU Prep small school weight funding in fiscal year 2016 and in every fiscal year thereafter. And now ADE is insisting that ASU Prep give those monies back.

ASU Prep reasonably relied on the July 20, 2015 email message from ADE. As a responsible charter school operator, ASU Prep made operational, staffing and student services decisions over the past several years in reliance on its anticipated and received funding. Its budget for each year was based on ADE's July 20, 2015 determination that it was entitled to the small school weight funding. It would have been unreasonable for ASU Prep to do otherwise.

The injury ASU Prep will suffer, indeed already is suffering because reductions have already been made, is as incontrovertible as the other elements of estoppel.

ASU Prep has already expended or encumbered the funding it received not only in past fiscal years but also monies it expected to receive this fiscal year. That reliance extends beyond the current fiscal year. ASU Prep has a multi-year operational plan that is also based on anticipated state funding revenues (much like the State's two-year budget planning). Thus, it has already undertaken activities that are intended to carry forward into next fiscal year, including staffing decisions.

In accordance with its budget for this fiscal year, and because the current fiscal year will be ending soon, ASU Prep is already financially obligated for lease payments, utilities, and transportation costs, among other things. Those costs cannot be reduced at this time. To deal with this unexpected burden at this point in the fiscal year ASU Prep will have to consider the elimination of teaching and staffing positions. As a public service organization whose mission is to develop and cultivate talent, labor is the largest percentage of the ASU Prep budget and the timing for such actions could not be worse from a student services and performance perspective.

ASU Prep just started its state testing, and graduation is around the corner. Student outcomes will certainly be affected by any disruption to the current educational environment. ASU Prep's student population is particularly vulnerable. It is largely comprised of students who are eligible for free and reduced lunch. Their families do not have the economic resources to "make up" for discontinued services by seeking tutors or other extra-school services. ASU Prep is these students' chance for success, and as you know, the school has been delivering on its promise of increasing student success in this population.

ADE's decision puts that continued success at risk. This is not hyperbole. I assure you that the reduction in funding at this time of the year will have a significant impact on students and staff. The unfairness of ADE's reversal of its previous decision will be directly born by these students, and by the teachers and staff who have dedicated themselves to serving them and have made their own economic sacrifices to do so. The punitive impact of the reversal of the previous decision will be felt by those least able to recover.

For all of these reasons, Arizona law prohibits ADE from proceeding as outlined in the March 22 letter.

At a Minimum, ADE's New Decision Should be Stayed.

In the alternative, we ask that you exercise your discretion and at least stay the implementation of the recent decision until the issue of ASU Prep's entitlement to the small school weight funding has been finally decided. This will reduce the harm to ASU Prep's students, teachers and staff. If ASU Prep ultimately is determined to be ineligible for all or a portion of its previous funding, ADE will have the ability to recoup any overpayment from future ASU Prep state payments.

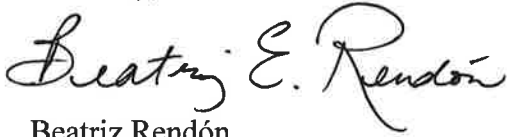
ADE will not be harmed by a stay, while ASU Prep will certainly be harmed by a reduction in its funding during the pendency of the appeal, as indicated above.

One last note, which I believe is further evidence that the Department acted hastily and without full consideration of all of the facts and circumstances: the repayment calculations attached to the March 22 letter, include amounts paid to Phoenix Collegiate Academy ("PCA"). Until this fiscal year, PCA was a separate charter holder entity, sponsored by the Arizona State Board for Charter Schools. It was legally unrelated to ASU Prep, and its entitlement to small school weight funding was also entirely unrelated to the issues raised here.

Had we been given an opportunity to meet with you prior to ADE's determination, we could have addressed that issue and all of the other issues raised in this letter. We are disappointed that ADE reversed its long-standing decision – and began withholding funding – without so much as the courtesy of an opportunity to be heard.

Please let me know if you have any questions about this letter. I'm happy to speak with you about these issues, and again, I urge you to reconsider ADE's position.

Sincerely,

A handwritten signature in black ink that reads "Beatriz E. Rendón". The signature is written in a cursive style with a large, stylized 'B' and 'R'.

Beatriz Rendón
Chief Executive Officer
ASU Preparatory Academies

